

COMMONWEALTH OF MASSACHUSETTS
THE SUPREME JUDICIAL COURT

HAMPDEN, ss.

Docket No. FAR-
Appeals Court Docket No.
2019-P-0810

COMMONWEALTH
Appellee

v.

JASON CATO
Appellant

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO OBTAIN
FURTHER APPELLATE REVIEW

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DATED: September 1, 2020

Pursuant to Mass. R.A.P. 27.1, the defendant-appellant, Jason Cato (Cato), hereby applies for leave to obtain further appellate review from this Court. The Appeals Court, relying on this Court's decision in *Commonwealth v. Torres-Pagan*, 484 Mass. 34 (2020), concluded that Springfield Police Officers were justified in ordering Cato, an African-American man, to exit his car during a traffic stop, having stopped his car with multiple police cruisers, and multiple officers approaching Cato with drawn firearms. While Cato was handcuffed by officers, police searched his van and found a firearm under the driver's seat.

On June 3, 2020, this Court issued a rare letter to the judiciary and the bar recognizing "what African-Americans know all too well: that too often, by too many, black lives are not treated with the dignity and respect accorded to white lives." This Court challenged the judiciary to "look afresh" at what the courts do, to "root out conscious and unconscious bias in our courtrooms", and to ensure equal justice for African-American and white Americans.

This decision does not represent equal justice – Cato was aggressively stopped and searched because police heard what they believed to be gunshots from a largely minority neighborhood with a reputation as a high-crime area; arrived shortly afterwards to see an African-American man driving his van on a through street in the area; and learned that the owner of the van had a prior firearms

conviction of unknown age. The stop – ostensibly for an expired inspection sticker – involved multiple police cruisers and officers approaching with drawn guns¹. As recent events have shown us, this stop easily could have become yet another tragic shooting of an African-American motorist.

The Appeals Court’s decision is in conflict with *Commonwealth v. Torres-Pagan*, 484 Mass 34 (2020); and *Commonwealth v. Barreto*, 483 Mass. 716 (2019). Driving through an area from which police heard gunshots, with no location for those shots, no description of the shooter(s), and no suspects, is not grounds for a felony stop; ordering the African-American driver of a van out of it; or searching the van without warrant or cause. In light of this decision, there is little limit to police officers’ ability to stop at gunpoint those in minority neighborhoods associated with crimes on the thinnest of rationalizations. Particularly now, the requirements for stopping African-American motorists and ordering them out of their vehicle at gunpoint both affects the public interest and the interests of justice.

¹This Court should note that the stop was made by the Springfield Police Department, which was the subject of a recent Department of Justice report detailing problems with that Department’s Narcotics Units veracity and use of force – issues relevant to the legality of the search made after Mr. Cato's vehicle was stopped for a traffic violation. (Officer Sullivan, who testified about the stop and search, had been a member of the Narcotics Unit for three years.) The report is available at: <https://www.justice.gov/opa/press-release/file/1292901/download>

STATEMENT OF PRIOR PROCEEDINGS

On May 19th, 2016, Springfield police officers Sean Sullivan (Sullivan) and Brian Kelly (Kelly) stopped Mr . Cato's car, searched it without a warrant, and seized a .25 caliber handgun found deep under the driver's seat.

Cato was arraigned the next day in Hampden District Court in this matter. He was charged with carrying a firearm without a permit and with driving a vehicle without a valid inspection sticker.

Cato moved to suppress the firearm seized in a warrantless search of his car under the federal and state constitutions by motion filed February 15, 2017. After a hearing on March 3, 2017², the trial court (Groce, J.) denied the motion on May 5, 2017. (R. A. 18-26 (Findings and Ruling appended))

Cato again moved to suppress the firearm on August 7, 2017. On August 10, 2017, the trial court (Groce, J.) heard and denied a supplemental motion to suppress, arguing that police stopped Cato's car on a pretext. (T. 8/10/17) The trial court noted that it had found that police had justification for the stop separate from the expired inspection sticker; it did not feel that pretext was at issue. (T.

²The audio recording of this hearing is not available. The trial court accepted the parties' stipulation of what was said in addition to the facts found by Judge Groce. See Order on Stipulation of Missing Transcript dated 7/15/19. (R. A. 35)

8/10/17 at 9-10)

Cato was tried before a jury on August 17, 2017. (Ouimet-Rooke, J.) (T. 8/17/17) He was convicted of carrying a firearm without a license in a motor vehicle. (T. 8/17/17 at 141) He was found not responsible for the inspection sticker offense. Cato was sentenced on August 18, 2017 to the mandatory minimum term of eighteen months. (T. 8/17/17 at 6-8) He has completed his sentence.

Cato filed an appeal. His conviction was affirmed by Memorandum and Order Pursuant to Rule 23.0 on August 13, 2020 (appended). Cato is not seeking modification or reconsideration in the Appeals Court.

STATEMENT OF FACTS

In addition to the facts described in the Appeals Court's Memorandum and Order (Memorandum at 2-4), Cato re-iterates that police did not have a location for the shots within the densely populated Putnam Circle neighborhood. (RA 19) There is no evidence of a 911 call or a Shotspotter report. Police had no information about who fired the shots or where they were fired, whether the shooter(s) were on foot or in a vehicle, or any description of the shooters. All Officers Sullivan and Kelley knew was that while they were parked two blocks away from the Putnam Circle neighborhood, Sullivan heard what he believed were

gunshots. They drove to the neighborhood, arriving a minute later, to see the streets unusually quiet³ and Cato's van driving on a through street.

Police didn't see any other moving vehicles or people as they began to drive through the neighborhood, but from a map introduced as an exhibit (Defense A), they had only driven along half of the through street. They did not know whether there were vehicles or people in parking lots, side streets, or yards in half of the neighborhood from which the shots were heard.

The officers followed Cato's van, learned that it had an expired inspection sticker, and learned that Cato had a firearms offense of unknown age.⁴ They stopped the van using at least three cruisers and numerous officers. The Appeals Court does not comment on the trial court's subsequent remarks that it had not believed Officer Sullivan's testimony that he didn't have his gun out; "I thought that it was ludicrous". (T. 8/10/17 at 11) Cato was described as nervously looking

³Sullivan said that it was not uncommon to see foot and car traffic in the neighborhood at that time of night. Sullivan suspected that residents had taken shelter. There was no indication that Cato lived in the neighborhood. His vehicle could have been, like the police, blocks away when the shots were fired, and coincidentally passing through the neighborhood when they arrived a minute later.

⁴There was no evidence at the hearing about the age of the charge. The sentencing hearing suggests that Cato had not had any criminal charges since 2007. (T. 8/18/17 at 8) This charge was nearly a decade old when Cato was stopped.

at the officers with his eyes wide open (Memo at 3) – a logical and expected reaction for an African-American man surrounded by officers with drawn guns demanding he drop his keys on the street and get out of the car.

Officers ordered Cato out of his car and handcuffed him. Police did not mention the smell of gunpowder or any indication that someone had fired a gun in or around the van only a minute early. Sullivan looked under the driver’s seat and saw a handgun under the seat’s motor. (Ex. 4) The trial court also didn’t believe Sullivan’s testimony that, while being held at gunpoint, Cato “lunged” for the gun under the seat. (T. 8/10/17 at 12) Nevertheless, it denied the Suppression Motions.

QUESTIONS FOR REVIEW

The primary issue here is whether Springfield Police violated Cato’s constitutional rights by stopping his van using excessive force and searching his van without a warrant, based on the very limited information they had.

ARGUMENT

I. This Court should Grant Further Appellate Review because the Appeals Court’s Decision Broadens Law Enforcement’s Ability to Stop a Motorist Anywhere Near a Suspected Crime Scene in Violation of this Court’s Decisions and Public Policy.

For two decades, this Court has acknowledged the “unique hardship” that routine traffic stops pose on minorities. *Commonwealth v. Gonsalves*, 429 Mass.

658, 663 (1999). See *Commonwealth v. Amado*, 474 Mass. 147, 151 n. 4 (2016); *Commonwealth v. Feyenord*, 445 Mass. 72, 88 (2005) (Greaney, J. concurring). However, this Court has been unwilling to limit pretext stops.

In incident after incident, the public hears the same justification for police aggressively using force against African-Americans – I thought he was armed. I thought there was a gun. See generally Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 163-64 (2017); Lee, “*But I Thought he had a Gun*”: Race and Police Use of Deadly Force, HASTINGS RACE & POVERTY L. J. (2004). Here, the sound of gunshots from two blocks away and a past firearms conviction of unknown age form the basis for stopping Cato’s van, approaching him at gunpoint, ordering him out of his van, and searching it without a warrant. This Court should demand more evidence before police can use these aggressive, intrusive tactics, particularly against minority motorists passing through areas of a suspected crime. The suspected presence of a gun should not trump the defendant’s constitutional rights.

A. Although Police had Reasonable Grounds to Stop Cato based on the Traffic Violation, They Lacked Reasonable Suspicion to Detain him as a Shooting Suspect.

Cato agrees that Springfield police could have performed a routine traffic

stop based on the expired inspection sticker. A routine traffic stop, however, does not involve three police cruisers boxing in the defendant's van; multiple officers approaching with drawn firearms; or ordering the defendant out of his van.

Here, police could validly stop Cato's van for the traffic infraction. See *Commonwealth v. Buckley*, 478 Mass. 861, 873 (2018). However, if police stopped Cato for a traffic infraction, then they did not have justification to approach at gunpoint, remove him from his van, and search him. The encounter should have ended when Cato produced his license and the car's registration, and the officer gave him a citation for the traffic offense. See *Commonwealth v. Cordero*, 477 Mass. 237, 242 (2017); *Commonwealth v. McCleery*, 345 Mass. 151, 153 (1962).

A routine traffic stop may not last longer than "reasonably necessary to effectuate the purpose of the stop". *Cordero*, 477 Mass. 242. In order to prolong the encounter, the officer must have reasonable grounds to believe that there is further criminal conduct afoot. See *Commonwealth v. Silva*, 366 Mass. 402, 406 (1974). Police actions must be "reasonable in time, space, and the degree of force employed." *Commonwealth v. Ciaramitaro*, 51 Mass. App. Ct. 638, 644 (2001).

The Appeals Court affirmed the trial court's reasoning that there was reasonable suspicion to detain Cato based on his presence in the neighborhood

where the officers had heard shots a minute earlier; that he was the first and only person they had seen when they arrived in the neighborhood; that he was driving away⁵; that Cato had a previous firearms charge of unknown age; and that Putnam Circle was a “high crime area”. (Memo at 3-4)

The Appeals Court began by observing that “[t]he firing of gunshots in a neighborhood is a dangerous situation requiring a prompt and thorough police investigation”. (Memo at 4) While true, there was no evidence to link the shots to any location within the neighborhood, any suspect, or to a vehicle. Police may have been justified in making an ordinary traffic stop of Cato’s van, and asking if he had seen or heard anything in the neighborhood. That interaction might have given officers reasonable suspicion that Cato was involved or might have given them information to narrow down the location of the shooting or suggest suspects. Police, however, assumed Cato’s involvement, aggressively stopped his van, and ordered him out of it.

The Appeals Court also found that the nature of the suspected crime added “an edge” to the reasonable suspicion calculus. (Memo at 6) Cato disagrees. The

⁵Without knowing where within the neighborhood the shots were fired, how can one find that he was driving away from the scene? Cato was on a through street in the middle of the neighborhood. He could as easily have been driving towards the scene – the police having unknowingly passed it, or on a tangent if it occurred on a side street or in a parking lot.

officers knew nothing beyond the sound of shots somewhere in the neighborhood. They did not know if the shooter retained the gun or discarded it to avoid discovery; whether it was fired in self-defense, or anger; or whether it was fired at someone or in the air. Officer Sullivan could approach Cato's van with caution and concern. Some back-up may have been reasonable under the circumstances. However, Cato complied when the police stopped him. He did not try to evade them. His nervousness was appropriate given the force the police displayed.

The trial court did not believe police descriptions of Cato's movements as they approached. "I do believe that when the police walked up on the vehicle, they saw him moving in the car", the judge later said. (T. 8/10/189: 12) The trial court did not further describe the movement or say that Cato was trying to conceal something. Drivers move when being stopped by police – they often take out their wallets to make their licence accessible and they reach for their registration to present it. There was nothing suspicious about Cato's actions that justified more than a traffic stop and perhaps some questions about where he had just been and whether he saw anything unusual.

Proximity to a crime scene can be a relevant factor. Compare *Commonwealth v. Foster*, 48 Mass. App. Ct. 671, 672-673, 676 (2000) (reasonable suspicion established where police observed persons matching physical

description on same street and headed in same direction as indicated by informant); *Commonwealth v. Mercado*, 422 Mass. 367, 371 (1996) (“Neither evasive behavior, proximity to a crime scene, nor matching a general description is alone sufficient to support the reasonable suspicion necessary to justify a stop and frisk”). Without knowing where the shooting occurred, police could not tell whether Cato had been in the area at the time; or, like the officers, was blocks away and happened to be driving through when they arrived.

Sullivan saw only Cato’s van moving at 11 p.m. that night. The Appellate Court relies on *Commonwealth v. Ling*, 370 Mass. 238, 241 (1976). There, police were responding to a report of a café burglary. They knew where the crime took place, saw the car they stopped within a mile of that location driving towards them, and recognized the driver. When police began to pursue, the driver fled.

Cato has not been able to find any similar case where the police knew so little about the alleged crime. *Warren*, *McKoy*, and *Perez*, all discussed in the briefs, are different.

In *Commonwealth v. Warren*, 475 Mass. 530, 537-38 (2016), an observation that the defendant and a companion were the only people the officer saw on the street was of “questionable value” in light of the lapse of time (several minutes), and the narrow geographic area of the search for suspicious persons.

In *Commonwealth v. McKoy*, 83 Mass. App. Ct. 309 (2013), police first noticed the defendant and his companion because they were the only people police had seen during their patrol on foot on “a cold, windy, wet night filled with snow and slush” in mid-January. Police knew that a shooting had occurred at a specific location about 100 yards from where police saw the two men. *Id.* at 310.

In *Commonwealth v. Perez*, 80 Mass. App. Ct. 272, 279 (2011), police stopped a car after a 911 call reporting shots fired. The 911 call provided a description of a car leaving the scene, including the registration number; the stop was within minutes of the call, not far from the scene, early in the morning, with extremely light traffic in the area.

Here, the police had no location for the shooting, no description of a suspect. All they had was the sound of gunshots coming from somewhere two blocks away in a densely settled neighborhood and a van driving on a through street as they responded. It is not enough to associate Cato with the shooting.

The officer’s opinion that Putnam Circle was a high-crime area did not give rise to reasonable suspicion. While a “high crime” neighborhood may be a proper factor in the reasonable suspicion analysis, “[j]ust being in a high crime area is not enough to justify a stop.” *Cordero*, 477 Mass. at 244-45. This Court has repeatedly urged caution, pointing out that “many honest, law-abiding citizens live and work

in high-crime areas. Those citizens are entitled to the protections of the Federal and State Constitutions, despite the character of the area”. *Id.* “The exercise of that caution necessarily means that we look beyond the term ‘high crime area’ to determine whether the inferences fairly drawn from that characterization ‘demonstrat[e] the reasonableness of the intrusion’” (citation omitted). *Id.*

Finally, the defendant's prior firearms charge, without further specific and articulable facts indicating that criminal activity was afoot, should not create reasonable suspicion. “[K]nowledge of a person's arrest record or unspecified ‘criminal conduct’ [may] be considered in a reasonable suspicion evaluation”, further evidence is required to support reasonable suspicion. *Cordero* at 246. Here, there was nothing about Cato’s vehicle to suggest that he was involved in recent gunfire – there was no smell of recently-fired gunpowder, no speedy or evasive driving suggesting fleeing the location, and no ShotSpotter or 911 information to give the police any indication of what happened.

B. Springfield Police Used Excessive Force in Stopping Cato’s Van, Converting a Routine Traffic Stop into an Arrest without Probable Cause.

Police used excessive force when they boxed in Cato’s van and approached him at gunpoint. The Appeals Court distinguished its decision in *Commonwealth v. Santiago*, 93 Mass. App. Ct. 792, rev. denied 480 Mass. 1111 (2018), because

the police heard gunshots. Santiago was stopped for a traffic violation; police boxed in his car with several police cars and approached with drawn guns.

An approach with drawn guns is generally thought excessive in the absence of any suggestion that the defendant is armed or other circumstances suggesting the possibility of violence. Even with information suggesting that a defendant possesses a firearm illegally, however, police are not generally justified in drawing their guns in the absence of additional ‘fear-provoking’ circumstances. When considering a vehicle stop, we also look to the number of police used to effectuate the stop and whether the movement of the automobile was impeded.

(internal quotation marks, citations omitted) *Santiago* at 795. There the Court held that the officers’ use of force was excessive – although the defendant’s prior firearms conviction was relevant, the police did not have any particular information suggesting the defendant possessed a firearm at that time, nor did the defendant take any action that caused the officers to feel unsafe prior to their approach. Here, as in *Santiago*, the driver promptly and uneventfully stopped when signaled and complied with the officer’s orders. There was no evidence other than proximity to associate Cato with the gunshots.

Here, as in *Santiago* at 794, the officers’ approach escalated a lawful seizure into an arrest without probable cause. That Court concluded “that police conduct here was not ‘commensurate with their suspicion.’ The stop of the defendant thus constituted an arrest.” (internal citation omitted) *Id.* at 799.

Unlike *Santiago* at 571, there was no description here of a driver or vehicle

“arising from recent attacks in the area by an individual armed with a dangerous weapon, possibly a firearm” that Cato or his van was said to match. The force used by Springfield police converted an investigatory stop into an arrest without probable cause. Cato’s motion to suppress should have been granted.

C. Springfield Police Improperly Searched Cato’s Van without a Warrant.

The Appeals Court does not address whether “Sullivan’s subsequent entry into the motor vehicle was a proper ‘frisk’ of its interior justified by the safety risk inherent in the nature of a ‘shots fired’ investigation.” (Ruling at 7)

The trial court had noted Sullivan’s recollection that Cato’s eyes were wide and he seemed nervous. (Ruling at 4-5) “That the defendant exhibited signs of nervousness and evasiveness in the context of an involuntary police encounter cannot, without more, generate reasonable suspicion.” *Cordero*, 477 Mass. 244. It is not surprising that a black male driver would be nervous when his van is boxed in by three police cruisers, and officers are approaching him with drawn weapons.

Viewed from the vantage of what the Sullivan knew before discovering the handgun, he did not have reasonable suspicion to justify searching Cato’s van. The police actions exceeded constitutional grounds.

Sullivan could not have expected to find evidence of the crime for which Cato could have been arrested – operating without a valid inspection sticker –

under the seat of Cato’s van. See *Commonwealth v. Darosa*, 94 Mass. App. Ct. 635, 642 (2019) rev. denied 481 Mass 1108 (2019); *Commonwealth v. Gomes*, 453 Mass. 506 (2009). To justify the search as incident to arrest, the Commonwealth had to show that Cato was within reaching distance of the passenger compartment of the van – unlikely when he was handcuffed and detained by several officers with drawn guns. *Darosa*, 94 Mass. App. Ct. at 642. Allowing the Commonwealth to search Cato’s van because they would have let him return to his vehicle after arrest would permit an end run around *Gant*, allowing officers to search a vehicle whenever there is probable cause to arrest its recent occupant. *Darosa*, 94 Mass. App. Ct. at 644-45. Police are not permitted to “general[ly] rummag[e] through the interior spaces of a stopped car.” *Commonwealth v. Santos*, 65 Mass. App. Ct. 122, 128 (2005).

CONCLUSION

For the above-stated reasons, Cato asks the Court to grant further appellate review of this appeal.

Date: September 1, 2020

Respectfully Submitted,
The Defendant
By his attorney,

_____/s/_____
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CERTIFICATE OF SERVICE

The undersigned certifies that on this 1st day of September, 2020, I have served the Commonwealth by emailing application for further appellate review to: Lee Baker, Esq., Assistant District Attorney, Hampden County District Attorney's Office, 50 State Street, Springfield, MA 01003.

_____/s/_____
Lisa J. Steele

ADDENDUM

Findings and Ruling on Defendant's Motion to Suppress p. 20

Memorandum and Order Pursuant to Rule 23.0 p. 29

Unusual

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS.

SPRINGFIELD DISTRICT COURT

No: 1623CR3688

COMMONWEALTH

V.

JASON CATO,
Defendant

FINDINGS AND RULINGS ON DEFENDANT'S MOTION TO SUPPRESS

FACTS:

At approximately 11 pm on May 19, 2016, Officer Sean Sullivan of the Springfield Police Department was sitting in his cruiser in the rear parking lot of the Mary Pottenger School. Sullivan, who had just started his shift was working from 10:45 pm to 6:45 am.

Sullivan was having a conversation with Officer Brian Kelly. Kelly was sitting in his own cruiser which was parked alongside Sullivan's. Kelly, had worked the prior 3 pm to 11 pm shift in the same sector and was providing Sullivan a debriefing regarding any occurrences in the sector during his shift. Only minutes into their conversation Sullivan heard the sound of what he immediately recognized to be 3 gunshots from a small caliber firearm.

Sullivan had been a police officer in the City of Springfield for 19 years. During that time he had served as a firearms instructor. He had also received his firearms

certification from the police academy. At the time of this incident Sullivan was in charge of the police department's "shotspotter" system where he was required to test its functioning and accuracy in part by listen to audio of gunshots as well as firing different caliber weapons throughout the city in order to see if the system was recognizing the sounds as gunshots.

Finally, Sullivan was formerly a member of the U.S. military in both active and reserve duty capacity, where he also served as a firearms instructor. While in the military Sullivan had served overseas deployments where he had been in combat situations and had been fired upon and returned fire.

The shots were coming from the area of Putnam Circle, a densely populated "high crime area" in the city of Springfield located two streets away from the Pottenger school and parking lot. Putnam Circle is a street in Springfield which contains a number of public housing units. The Putnam Circle area has been the site of numerous arrests for narcotics crimes as well as crimes of violence.

Officers have been dispatched to the Putnam Circle area on numerous occasions in the past for reports of shootings and or "shots fired" calls and have recovered weapons. In addition officers have engaged in foot chases of suspects and have been injured at this location secondary to confrontations with

suspects. As a result, Putnam Circle was an area that the Springfield Police focused on daily for purposes of deterrence even going so far as to have directed patrols through the area 2-3 times per night solely for that purpose.

Sullivan immediately drove in the direction of Putnam Circle. Officer Kelly followed behind in his cruiser. As Sullivan drove he called dispatch and advised them that he was proceeding to Putnam Circle for "shots fired". It took Sullivan approximately one minute to arrive at Putnam Circle.

When he arrived he immediately observed that a van was driving away from the area. Sullivan observed the van pull up to a stop sign at Putnam's intersection with Fernwold Street, stop at the sign and then take a left onto Fernwold. Although there were multiple cars parked on side of the street, Sullivan did not see any other motor vehicle traffic on the street at this time. Nor did he see any foot traffic in the area. Sullivan found these observations curious because it was not uncommon to see foot and car traffic in the Putnam Circle area at this time of night due to its dense population.

Sullivan followed the van onto Fernwold Street and then continued to follow as it took another left onto St. James Avenue. While following Sullivan was able to run the license plate of the van on his mobile data terminal. The query indicated that the inspection sticker on the van's plate had

expired. The query also indicated that the registered owner of the van, an individual named Jason Cato, was previously charged with a firearms offense.

Sullivan initiated a traffic stop after he had received this information. The stop occurred soon after the van had turned onto St. James Avenue, in front of a liquor store called the "Spirit Shoppe". The stop occurred no more than two to three minutes after Sullivan had initially heard the shots.

There were multiple police cruisers in the area at the time of the stop. Some had already been on patrol in the area prior to Sullivan's call and others had responded directly to the area because of his call. At the time Sullivan pulled the van over at least three cruisers surrounded the van. Sullivan pulled directly behind the van, officer Kelly pulled directly behind Sullivan and another cruiser, containing unidentified officers, pulled in front of the van blocking it in so that it could not pull away.

Officer Sullivan approached the van from the rear with his gun drawn. Other officers approached from different angles and had their guns drawn as well. As Sullivan approached he observed that the van contained one lone male occupant in the driver's seat. He also observed that the male was moving around in the front seat as he approached. At the driver's side door, Sullivan was able to observe that the operator, later identified

as the defendant Jason Cato, was nervously looking around at the officer's with his eyes wide open. The defendant was the same Jason Cato who was identified in the mobile data terminal query as the registered owner of the van.

Sullivan ordered Cato to turn off the car and drop the car keys on the ground. The driver's side window did not open, so Cato opened the car door and dropped his keys on the ground. Cato was then immediately removed from the car and placed on the ground where he was pat-frisked. Officers found marijuana on his person and then handcuffed him and walked him back to one of the cruisers parked behind the van. As they were walking him they asked Cato if he had anything else on his person and or whether or not there anything else in his car.

As Cato was being taken to the cruiser Sullivan leaned into the van and looked underneath the driver's seat. Sullivan immediately observed the handle of a firearm located under the seat. Sullivan asked Cato if he had a license to carry and when he responded no Sullivan ordered that he be placed under arrest for possession of the firearm.

RULINGS:

The stop of the defendant's motor vehicle was valid based upon probable cause that a traffic violation had occurred, specifically, the operation of the motor vehicle with an expired inspection sticker. Commonwealth v Santana, 420 Mass. 205, 207

(1995). However, independent of the traffic violation, Officer Sullivan also possessed a reasonable suspicion regarding the defendant's activities that was sufficient to justify a valid stop, detention and inquiry of the defendant.

Officer Sullivan's reasonable suspicion was based on a number of factors. First, the defendant was observed in the area where the gunshots came from less than one minute after the shots were fired. Commonwealth v. Perez, 80 Mass. App. Ct. 271, 279 (2011). Second, at time the defendant was observed, he was driving away from the area in question. Commonwealth v. Ling, 370 Mass. 238, 241 (1976). Third, at the time the defendant was observed driving away from the area there was no other foot or motor vehicle traffic viewed in the area. Commonwealth v. Crowley, 29 Mass. App. Ct. 1, 4 (1990).

Additionally, Sullivan's check of registered owner's criminal history indicated that he had previously possessed firearms. Commonwealth v. Nutile, 31 Mass. App. Ct. 614, 618 (1991). Finally, the area in question where the shots came from and where defendant was seen exiting was an area known to the police for instances of prior shootings as well as recoveries of weapons. United States v. Am, 564 F.3d 25, 30 (1st Cir. 2009). All these factors added up to provide Sullivan with a reasonable suspicion sufficient for an investigatory stop and detention of the defendant. Commonwealth v. Silva, 366 Mass. 402 (1974).

The use of force by the police during and subsequent to the stop of the defendant did not in and of itself transform the detention of the defendant into an arrest requiring probable cause where the use of force was proportional to the "degree of suspicion that prompted the intrusion." Commonwealth v. Moses, 408 Mass. 136, 141 (1990). Based on the nature of the suspicion possessed, the actions taken by police during the stop, specifically the blocking of defendant's motor vehicle, the drawing of weapons, the removal of defendant from motor vehicle and the subsequent handcuffing of defendant were all reasonable and proportionate. See Commonwealth v. Fitzgibbons, 23 Mass. App. Ct. 301, 306 (2000) (blocking of motor vehicle can be appropriate in an investigatory detention), Commonwealth v. Varum, 39 Mass. App. Ct. 571, 575 (1995) (use of handcuffs can be appropriate in an investigatory detention), United States v. Buffington, 815 F.2d 1292, 1300-1301 (9th Cir. 1987) (forcible removal from car can be appropriate in an investigatory detention) and United States v. Tilmon, 19 F.3d 1221, 1227 (7th Cir. 1994) (drawing of weapons can be appropriate in an investigatory detention).

Finally, Sullivan's subsequent entry into the motor vehicle was a proper "frisk" of its interior justified by the safety risk inherent in the nature of the "shots fired" investigation, specifically that the defendant may be "armed and dangerous."

Silva at 405 (1974). Additionally, such entry is valid where, as here, its purpose is not to search for evidence of a crime but instead is "to allow the officer to pursue his investigation without fear of violence." Adams v. Williams, 407 U.S. 143, 146 (1972). See also Commonwealth v. Almeida, 373 Mass. 266, 272 (1977). Contrast Commonwealth v. Johnson, 82 Mass. App. Ct. 336, 341-342 (2012) (no justification for frisk of interior) and Commonwealth v. Santos, 65 Mass. App. Ct. 122, 127 (2005) (improper purpose for frisk of interior). It was during the frisk of the interior the firearm was observed laying under the driver's seat.

In circumstances such as these this court is cognizant of the fact that there is an overriding Constitutional "command of reasonableness" regarding police conduct that must be adhered to. Varnum at 575 (1995). Ultimately, the degree of intrusion must be objectively reasonable and proportionate to the suspicion possessed. Fitzgibbons at 305 (2000). After consideration this court does not find that the conduct here was either unreasonable or disproportionate to the suspicion possessed. "Examining the totality of the circumstances here indicates that the police conducted an investigatory stop rather than an arrest without probable cause." United States v. Buffington at 1300. (9th Cir. 1987). Accordingly the defendant's motion to suppress is DENIED.

Dated: _____

5/5/17



Charles W. Groce, III
Associate Justice

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 19-P-810

COMMONWEALTH

vs.

JASON CATO.

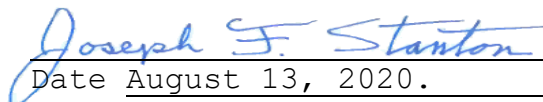
Pending in the Springfield District

Court for the County of Hampden

Ordered, that the following entry be made on the docket:

Judgment affirmed.

By the Court,

, Clerk
Date August 13, 2020.

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-810

COMMONWEALTH

vs.

JASON CATO.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a District Court judge denied the defendant's motion to suppress evidence, a jury convicted the defendant of unlawfully possessing a firearm in violation of G. L. c. 269, § 10 (a).¹ On appeal from the judgment, the defendant claims that the motion to suppress should have been allowed because (1) police lacked reasonable suspicion to issue an exit order, (2) excessive police force transformed a valid traffic stop into an arrest requiring probable cause, and (3) police exceeded the scope of any permissible inquiry by looking into the minivan from which the defendant was removed. We affirm.

¹ The trial judge, who did not decide the motion to suppress, found the defendant not responsible for a civil infraction of operating without a valid inspection sticker.

Background. We summarize the motion judge's unchallenged findings. Springfield Police Officer Sean Sullivan was seated in his cruiser at approximately 11 P.M. on May 19, 2016, when he heard the sound of three gunshots from a small caliber firearm.² The shots came from Putnam Circle, a densely populated area that was two streets away from where Sullivan was parked. Officers had been dispatched to the Putnam Circle area on numerous occasions in the past for reports of shootings, recovered weapons in the area, engaged in foot chases of suspects, and been injured during confrontations with suspects. As a result, the Springfield Police Department focused on the Putnam Circle area daily and directed patrols through the area for the purpose of deterrence.

Sullivan arrived at Putnam Circle within one minute of hearing the shots and observed the area to be abandoned, except for a minivan driving away. Sullivan found it odd that no one else was driving or walking in the area because it was not uncommon to see foot and car traffic at that time of night, due

² Sullivan was a nineteen-year veteran of the Springfield Police Department and was in charge of the department's "shotspotter" system. This responsibility involved testing the system's functioning and accuracy by listening to audio of gunshots, as well as firing different caliber weapons throughout the city in order to see if the system recognized the sounds as gunshots. Sullivan also (1) had received a firearms certification from the police academy, (2) previously served as a firearms instructor, and (3) engaged in combat situations involving gunfire while serving in the United States military.

to the density of Putnam Circle. Sullivan followed the minivan, ran its license plate through his cruiser's mobile data terminal, and learned that (1) the vehicle's inspection was expired and (2) the registered owner, of whom there was a picture, had previously been charged with a firearm offense. There was no evidence regarding the age of the charge.

Sullivan initiated a stop of the minivan and parked his cruiser in a way that blocked the minivan from leaving. Several other officers arrived, and at least three cruisers parked to block the minivan in. As multiple officers approached the minivan with their guns drawn, Sullivan observed that the driver, the defendant, looked like the picture of the registered owner. The defendant was moving around in the front seat and nervously looking at the officers with his eyes wide open. He was removed from the minivan, placed on the ground, and pat frisked. Sullivan looked under the driver's seat of the minivan and immediately observed the handle of a firearm.

The motion judge held that the stop was a valid one based on the minivan's expired inspection. Independent of the traffic violation, however, the motion judge found that Sullivan had reasonable suspicion to stop, detain, and inquire of the defendant based on (1) the defendant's presence in the area from whence gunshots came less than one minute after the shots were fired, (2) the defendant being the only person in the area, (3)

the fact that the defendant was driving away, (4) Sullivan's knowledge that the defendant was previously charged with possessing firearms, and (4) the fact that Putnam Circle was a high crime area. Given the nature of the investigation, the motion judge did not view as unreasonable (1) the officers' use of force in blocking the minivan in or approaching with guns drawn or (2) Sullivan's frisk of the interior of the minivan.

Discussion. An exit order is justified during a traffic stop where police have an objectively reasonable suspicion of criminal activity, Commonwealth v. Torres-Pagan, 484 Mass. 34, 38 (2020), that is "grounded in specific, articulable facts and reasonable inferences [drawn] therefrom rather than on a hunch" (quotations and citation omitted), Commonwealth v. Meneus, 476 Mass. 231, 235 (2017). The motion judge found that Sullivan's exit order to the defendant was lawful because Sullivan reasonably suspected that, moments earlier, the defendant was involved in illegally discharging a firearm in Putnam Circle. In reviewing the motion judge's decision, we accept his unchallenged factual findings, "but we independently determine the correctness of the judge's application of constitutional principles to the facts as found." Commonwealth v. Catanzaro, 441 Mass. 46, 50 (2004).

The firing of gunshots in a neighborhood is a dangerous situation requiring a prompt and thorough police investigation.

See, e.g., Commonwealth v. Doocey, 56 Mass. App. Ct. 550, 558 (2002); Commonwealth v Hurd, 29 Mass. App. Ct. 929, 930 (1990). "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency" (quotation and citation omitted). Mincey v. Arizona, 437 U.S. 385, 392 (1978). In circumstances where a gun "presents an imminent threat because of shots just fired," Doocey, supra at 557, the reasonable suspicion calculus requires consideration of the following factors, among others: (1) the particular characteristics which distinguish the suspect from others, (2) the proximity of the place of the stop to the place of the suspected criminal activity, (3) the time between the suspected criminal activity and the stop, (4) the conduct of the suspect upon his initial encounter with the police, including evasive behavior, (5) whether there is independent police corroboration of the criminal activity, (6) the geographic boundaries of the area where the suspect may be found, and (7) the nature of the place where the suspected criminal activity occurred. Id. at 554-556.

Here, a specially trained, veteran police officer heard gunshots coming from Putnam Circle and arrived there within one minute. The unusual absence of foot and vehicle traffic in the densely populated area supported Sullivan's suspicion that the gunshots originated there, as residents may have taken shelter.

See Commonwealth v. Stoute, 422 Mass. 782, 790 (1996), quoting Terry v. Ohio, 392 U.S. 1, 27 (1968) (we consider "specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience" in determining whether officer acted reasonably in initiating stop). The only person who was in the area was the defendant, "heading away from the scene." Commonwealth v. Ling, 370 Mass. 238, 241 (1976). The defendant had previously been charged with possessing firearms and appeared to be nervously moving around in the vehicle as officers approached.³ Viewing the circumstances as a whole rather than each factor individually, see Stoute, 422 Mass. at 790, which the defendant would have us do, we see no error in the motion judge's conclusion that Sullivan's actions were supported by a reasonable suspicion that the defendant was involved in illegally discharging a firearm moments earlier.

The nature of the suspected crime added "an edge" to the reasonable suspicion calculus, Doocey, 56 Mass. App. Ct. at 557, by "demonstrating not only that the suspect being sought was armed and dangerous, but also was ready, willing, and able to use that firepower, having just discharged the weapon." Id. at

³ Although we do not know on this record whether the expired inspection rendered the minivan legally inoperable, see Commonwealth v. Rivas, 77 Mass. App. Ct. 210, 215 (2010), the defendant does not challenge the propriety of the stop on this basis, and, therefore, Sullivan's right to be in a position to make these observations.

553. When added together with the defendant's sole presence in the immediate area and officers' knowledge that Putnam Circle was associated with past shootings, discoveries of weapons, and injuries to officers during confrontations with suspects, we agree with the motion judge that the nature of the suspected crime justified the officers' decisions to use their cruisers to block the minivan from leaving and approach with weapons drawn. "The Constitution does not require officers to gamble with their personal safety" (quotations and citation omitted).

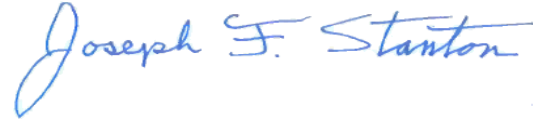
Commonwealth v. Santiago, 93 Mass. App. Ct. 792, 795 (2018).

The recent firing of a gun provided the "additional 'fear-provoking circumstances'" that were absent in Santiago, upon which the defendant relies, id. at 795, quoting Commonwealth v. Bottari, 395 Mass. 777, 782 (1985), and made the force used by the police in this case reasonable. The blocking of the defendant's minivan and his subsequent removal from that minivan did not transform the traffic stop into an arrest. Finally, the recent firing of a gun also justified Sullivan's "frisk" of the interior area of the van where the defendant had been seen

moving around in his seat. See Commonwealth v. Almeida, 373
Mass. 266, 272 (1977).

Judgment affirmed.

By the Court (Sullivan,
Kinder & Lemire, JJ.⁴),



Clerk

Entered: August 13, 2020.

⁴ The panelists are listed in order of seniority.